Nos. 80-289 and 80-692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854 AND
UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD
AND AMAX COAL COMPANY,
A DIVISION OF AMAX, INC.,
Respondents

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

AMAX COAL COMPANY,
A DIVISION OF AMAX, INC., ET AL.
Respondent

REPLY BRIEF OF PETITIONERS, UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

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QUESTION PRESENTED

Whether the management-appointed trustee of a jointly administered multiemployer trust fund established under Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B).

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I. Amax Has Raised Additional Questions and Changed the Substance of the Question Presented, in Violation of Rule 34.1(a). Irrelevant and Immaterial References Should be Disregarded and Stricken by the Court. (Brief of Respondent, pp. 2-6).

In the Summary of Argument, Respondent in its Brief has raised and argued factual and legal questions not presented in the grant of Certiorari. It has urged what it terms "cogent facts" unsupported by references

to testimony as a "backdrop" to its argument (Brief for Respondent, pp. 2-6), cataloguing contentions earlier advanced in its Brief in Opposition, pages 7-10, that the Union's "totality of conduct" clearly established bad faith bargaining. This contention was rejected by the NLRB (Jt. App. 43a-45a, N.3; 203a-213a). It is not before this Court.

These arguments are advanced without documentation to the record, as in Note 2 on page 4 of Brief for Respondent, where it is asserted without proof that the UMW funds "... reduce benefits for all of the participants because of the short fall in funding caused by the 'wildcat' strikes in the BCOA bargaining unit," and subsequently in the numbered paragraphs on pages 4 through 6 of Respondent's Brief.

The use of extraneous matters not substantiated in the record is contrary to the rules. Rule 34.2 does not authorize a respondent, under the guise of presenting a Summary of Argument, to present unsupported factual averments or argument on points not encompassed within the question on which certiorari is granted. Rule 34.1. The unsupported averments and irrelevant arguments contained in the Summary of Argument, pages 2 through 6 of Respondent's Brief, should be disregarded and stricken.

II. A. The Evidence Does Not Support the Statement That Negotiations Established the Trustees to be Collective Bargaining Representatives. (Brief of Respondent, pp 11-13)

In succeeding sections of the argument, Amax' Brief continues to rely on assertions of fact and law that are unsupported in the record and are not clearly suggested by the question on which certiorari was granted. It is stated that "the Union . . . deferred to the UMW Trust trustees, who rejected Amax's negotiations [sic] proposal." (Brief for Respondent, p. 13). The exhibit in the Joint Appendix at pages 64-66 to which reference is there made do not support the statement. Rather, it appears that the Union's Vice-President, a collective bargaining representative, in Joint Exhibit 1(ggg) clearly rejected the company proposal, after having inquired of the Fund Trustees whether reciprocity with a private pension fund was possible, and being informed by the trustees, acting in their offices as such, that reciprocity was not available.

Contrary to Respondent's argument, the exhibit demonstrates the separate and distinct functions of the bargaining representative, on the one hand, and the trustees, on the other. The self-serving statements in Joint Exhibits 1(kkk) and 1(jjj), also referred to by Respondent, are clearly argument and not fact.

B. THE TRUSTEES' POWERS UNDER THE TRUST AGREEMENTS ARE NOT AN EXTENSION OF COLLECTIVE BARGAINING INTO TRUST ADMINISTRATION. (Brief of Respondent, pp. 13-18.)

Amax has built a large part of its case on *dictum* from *Associated General Contractors of Essex County, Inc. v. Laborers International Union,* 559 A.2d 222 (3d

Cir. 1977) and misrepresentation of the functions of trustees.

The statement quoted from that case on page 14 of Amax' Brief is mischievous *dictum,* unnecessary to the decision, which was that an amendment to a trust to alter the pattern of equal representation of employers and employees was illegal under Section 302(c)(5) of Taft-Hartley. There was no holding that trustees are collective bargaining representatives under §8(b)(1)(B) nor that trustees bound by fiduciary duty to the beneficiaries can also be directed to serve as adversary agents of employees or unions in collective bargaining. The holding of the case on its facts and §302(c)(5) of Taft-Hartley is unexceptionable; the damage of the *dictum* when taken as law is incalculable.

Amax pursues its destructive path through the forest of negotiation, misbranding as collective bargaining and grievance settlement those trust administrative functions which call for fidelity to beneficiaries to the exclusion of subservience to an appointing employer or union.

The subjects of choice of carriers and plans and eligibility of applicants are not those of collective bargaining. §302(c)(5) fixed the method of resolution of deadlocks, not by the standards of bargaining subject to NLRB control, but by compulsory arbitration, a process which Congress rejected for the unfair labor practice sections of Taft-Hartley. Trust administration was recognized by Congress to be just that in §302(c)(5)(B). The trust agreement, not the law of the shop, past practice, or any other consideration of bargaining relationship, must specify the basis upon which fund payments are to be made to beneficiaries.

C. AMAX MISCONSTRUES §302(c)(5) to OUTLAW MULTIEMPLOYER TRUSTEES TO SERVE EXCEPT BY APPOINTMENT OF EACH EMPLOYER. (Brief for Respondent, pp. 19-21)

Amax makes a circular argument around the equal representation requirement of §302(c)(5). If that argument means what it seems to say, it would destroy multiemployer trusts, by imposing a requirement that each employer have its own trustee, thus defeating the equality of representation mandated by §302(c)(5).

But Congress intended §302(c)(5) to apply to multiemployer trusts exactly as it does to single employer trusts. The debates contain unmistakable proof that Senator Taft and his colleagues knew that unions were threatening strike action to require participation in multiemployer benefit plans, but nevertheless did not include in the act any prohibition against strikes with such an objective, although the House bill contained various measures to that end. That legislative history has been carefully analyzed and discussed in the *Amici Curiae* Brief of AFL-CIO, *et al.*, at pages 12 through 17 thereof.

D. A TRUSTEE CANNOT BE SUBJECTED TO DUAL LOYALTIES IN THE ADMINISTRATION OF AN EMPLOYEE BENEFIT TRUST. (Brief for Respondent, pp. 21-29)

Counsel for Amax have devoted many words in support of the untenable proposition that Congress, the NLRB, and the Courts recognize that trustees "wear two hats—one as a collective bargaining representative and one as a fiduciary."

This is inconsistent with what this Court observed, before ERISA, in *Allied Chemical and Alkali Workers of America, Local 1, v. Pittsburgh Plate Glass Company,*

404 U.S. 157, 170 (1971), as to the distinction between trust and agency.

> . . . The union's role in the administration of the [pension] fund is of a far different order from its duties as collective bargaining agent.

The same distinction, in different words, was made in the early decision of the Third Circuit Court of Appeals, in Judge Goodrich's words, in *United Marine Division, I.L.A. v. Essex Transportation Co.*, 216 F.2d 410, 412 (3rd Cir. 1954), holding that Taft-Hartley trustees were not representatives of the employees.

> They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as to any other trustees. The terms under which they act are carefully spelled out.

Amax' counsel persistently ignores this distinction, which Congress later embodied in the fiduciary sections of ERISA. As we noted on our main brief, pages 19 through 23, Congress explicitly drew those provisions to prevent ". . . a fiduciary from being put in a position where he has dual loyalties, and, therefore, cannot act exclusively for the benefit of the plan's participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. 5089.

Amax' "two hats" contention is plainly wrong.

E. Other Fiduciary Relationships Which May Be Enforceable Against Bargaining Agents Do Not Make Trustees Agents for Unions or Employers. (Brief for Respondent, pp. 29-30)

The Federal labor laws clearly contain many provisions which define and limit the duties, responsibilities and relationships of collective bargaining agents in their agency status, including the provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §501, of which Amax' counsel cites on pages 29 and 30 of Respondent's Brief. They do not say how or why the regulatory scheme of that statute makes Taft-Hartley trustees into bargaining agents.

All the labor laws Congress has adopted are entitled to a reasonable construction to accomplish their manifest purposes. It is not to be presumed that Congress intended conflicting jurisdiction among the various agencies of government having responsibilities in the fields which its enactments have treated in separate regulatory systems, specifically, for this case, labor-management relations and employee benefit trusts.

III. Congressional Purpose and Legislative History Are Misstated by Amax in Its Brief. (Brief for Respondent, pp. 30-39)

Respondents' Brief contains many misstatements of legislative history, in the sections beginning on pages 30 and 32. It is not true that Congress "finalized" §8(b)(1)(B) before §302(c)(5)(B) was "conceived"; the Taft-Hartley Act as finally enacted in 1947 contained both sections, which were the product of extensive study and deliberation.

It is fair to say that the same Congress that adopted that Act gave separate treatment to the prohibtion of strikes to compel employers to join in multiemployer bargaining units, in §8(b)(1)(B), from its treatment of multiemployer benefit trusts in §302(c)(5), by which its overriding purpose was, as its sponsors declared, to see that trusts were administered in the interests of their beneficiaries.

If Congress had wanted to make it a violation of §8(b)(1)(B) to strike to compel participation in a multiemployer benefit trust, it could have, and, we submit, would have done so expressly. It chose not to. The legislative history on the interrelation between §§8(b)(1)(B) and 302(c)(5) is discussed at pages 7 through 17 of the *Amici Curiae* Brief of AFL-CIO, *et al.*

Amax' misstatements of legislative history and purpose spring from a persistent misunderstanding of, and unwillingness to consider, the fundamental distinction which Congress, the NLRB and the courts, from the enactment of the Taft-Hartley Act, through the adoption of ERISA and the 1980 Multiemployer Pension Plan Amendment Act, have recognized between the agency relationship which governs collective bargaining and the trust relationship which controls employee benefit plan administration.

Amax' counsel strains mightily to square the clear language of §§404 and 406 of ERISA with his declaration (Brief for Respondent, p. 32) that "the fiduciary duties contained in ERISA and the common law do not preclude the fiduciary from acting in other capacities . . . ."

Section 404 of ERISA, 29 U.S.C. §1104(a)(1) requires a fiduciary to "discharge his duties with respect

to a plan *solely* in the interests of the participants and beneficiaries—and (a) for the *exclusive* purpose of providing benefits to participants and their beneficiaries." (Emphasis supplied.)

Section 406 of ERISA, 29 U.S.C., §1106(b)(2) declares

> (b) A fiduciary with respect to a plan shall not—
>
> * * *
>
> (2) in his individual or *in any other capacity act* in any transaction involving the Plan *on behalf of a party (or represent a party)* whose interests are adverse to the interests of the Plan or the interests of its participants or beneficiaries, . . . (Emphasis supplied.)

The effort to read out these sections by reference to §408(c)(3), which permits officers, employees, agents or other representatives of parties to serve as trustees, does not succeed. To accept Amax' argument requires a blind eye to the clear requirements of Sections 404 and 406 of ERISA, as well as to the pre-ERISA standards declared by the courts under §302(c)(5) of Taft-Hartley.

In *Curren v. Freitag,* 432 F. Supp. 668 (S.D. Ill. 1977), cited and relied on by Respondent at pages 37-38 of its Brief, the Court recognized the conflict of interest faced by an employer trustee who also represented as agent an employer whose contributions were delinquent, and held that while such a trustee might advise delinquent employers about courses of action they might follow, he should be prevented by the terms of Section 406(b)(2) of ERISA "... from being placed in a position where he was dealing with the Fund on behalf of his employer in a matter concerning the assets of the Fund." 432 F. Supp. at p. 672.

That decision does not mean that a trustee may, as trustee, act as agent for an employer contrary to the interests of the participants and beneficiaries. The most it can be read to mean is that §408(c)(3) of ERISA, 29 U.S.C. §1108(c)(3), permits a trustee of a fund to be an agent of a union or an employee in other contexts.

Again, counsel for Amax blinds his eyes to the limiting language of ERISA and the earlier cases, in arguing for the right to wear two hats in trust administration.

CONCLUSION

The basic distinction between agency and trust must be ignored if Amax' argument is to be accepted. The legislative purpose and history must be read through special glasses which obliterate or blur the careful distinctions which Congress, the NLRB and the Courts have until now recognized in the complex fields of labor-management relations and employee benefit trust regulations, if Amax' analysis is believed. The arguments are mistaken. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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